In the circumstances I must with regret decline to make the order applied for.

In view of my conclusion on the merits of this application, it is unnecessary to deal with the technical objections made by Inche' Ismi on behalf of the Commissioner of Lands.

Application refused.

Solicitors: *K. L. Devaser & Co.*

Re HILLMAN MINX NO. SU 3503

[O.C.J. (Adams J.) February 8, 1962]

[Muar — Originating Motion No. 1 of 1962]

Forfeiture — Vehicle of innocent person used in connection with an offence.

In this case a person who subsequently pleaded guilty to attempted kidnapping and unlawful possession of a firearm, hired a motor car from a self-drive firm. The motor car itself was under hire-purchase agreement. When the accused was arrested he took the police to the motor car and under the seat a pistol was found. At the end of the subsequent proceedings against the accused for unlawful possession of the firearm the learned President ordered the confiscation of the motor car without having heard either the owner of the motor car or the hire-purchase firm. On an application to set aside the order it was urged for the applicant, *inter alia*, (a) an innocent party should not be penalised by having his property declared forfeit through the fault of another, (b) before the order of forfeiture is made the owner should be called upon to show cause and given opportunity to do so.

Held: (1) as the motor car in this case was the property of a completely innocent person to whom no knowledge of the offence could be attributed, an order for forfeiture should not have been made;

(2) in order to ascertain whether the owner of the motor car was innocent it was necessary that he should be called upon to show cause;

(3) as this course was not adopted by the learned President the order of forfeiture was wrongly made and must be set aside.

Case referred to:—

(1) *Cheng Kee Huat & Anor.* v. *Public Prosecutor* [1948] M.L.J. 53.

ORIGINATING MOTION.

K. E. Hilborne for the applicant.

Hamzah bin Dato Abu Samah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Adams J.: This was an application by Mr. K. E. Hilborne of counsel on behalf of Lombard Acceptance Malaya Limited praying that the Order of the learned President of the Sessions Court at Muar forfeiting a Hillman Minx Motorcar No. SU 3503 be set aside.

Mr. Hilborne made three points. Firstly, the vehicle had not been used for the commission of any offence. Secondly, that in any event an innocent party should not be penalised by having his property declared forfeit through the fault of another. And thirdly, before an order of forfeiture is made the owner should be called upon to show cause and given an opportunity to do so.

The brief facts were that a person who subsequently pleaded guilty to attempted kidnapping and unlawful possession of a firearm, hired the motor car from a self-drive firm. The motor car itself was under hire-purchase agreement between the sister of the proprietor of the self-drive hire firm and the applicant. On the arrest of the accused in a hotel in Batu Pahat he took the Police to the motor car which was standing outside the hotel and under the seat a pistol was found. At the end of the subsequent proceedings against the accused for unlawful possession of the firearm the learned President ordered the confiscation of the motor car without having heard either the owner of the motor car or the hire-purchase firm.

Because of my views on the second and third of Mr. Hilborne's submissions I do not propose to say anything on the first. On the authority of *Cheng Kee Huat & Anor.* v. *Public Prosecutor* [1] I do not think that where a motor car, the property of a completely innocent person is being used in connection with an offence of which no knowledge can be attributed to such person, that an order of forfeiture should be made. In order to ascertain whether the owner of the motor car is innocent it is necessary that he should be called upon to show cause before any order of forfeiture is made. This course was not adopted by the learned President and that in my opinion is sufficient to say that the order of forfeiture was wrongly made and must be set aside. I understand that the vehicle has since been auctioned and sold. If that is correct, any such sum as was realised by the auction should be handed over to the applicant.

Application granted.

Solicitors: *Hilborne, Chung & Co.*

TAN AH HOONG v. MAHALINGAM

[O.C.J. (Suffian J.) February 12, 1962]

[K.L. — Civil Suit No. 528 of 1959]

Damages — Fatal accident — Contributory negligence — Funeral expenses incurred voluntarily by friends and relatives — Moral obligation to repay.

In this case the defendant's car collided with a trishaw ridden by the plaintiff's husband (aged 35) thereby causing his death. The defendant was accelerating, but he is not certain whether he had changed into top gear before the collision, but he mentioned that he was not travelling fast. Brake marks left by the off side and near side wheels on the dry road were 60 and 53 feet long respectively. The deceased was thrown forward 14 ft. and the trishaw was thrown forward 39 ft. The defendant also stated that he did not take into consideration the fact that the deceased might enter the major road suddenly. The following questions were raised: (1) was the defendant negligent in colliding with the trishaw and causing the death of the deceased, (2) was the deceased guilty of contributory negligence, and (3) what was the quantum of damages payable by the defendant if he was liable in whole or in part.

Held: (1) from the circumstances of the case the defendant was guilty of negligence, but nevertheless the deceased, by his own want of care, contributed to his own injury owing probably to his misjudgment of the defendant's speed;

(2) taking all the circumstances of the case into consideration the sum of $13,000 should be awarded as general damages, but as the deceased was equally to blame, his damages is reduced to $6,500.

Per Curiam: The funeral expenses which were paid by friends and relatives who expected to be repaid and which the plaintiff felt she was under a moral obligation to repay should be recovered by the plaintiff.

Cases referred to:—

(1) *Fardon* v. *Harcourt-Rivington* (1932) 48 T.L.R. 215, 216; [1932] All E.R. Rep. 81.

(2) *London Passenger Transport Board* v. *Upson* [1949] 1 All E.R. 60, 70.

(3) *Daly* v. *Liverpool Corporation* [1939] 2 All E.R. 142, 144.

(4) *Nance* v. *British Columbia Electric Railway* [1951] A.C. 601, 611.

(5) *Lang* v. *London Passenger Transport Board* [1959] 3 All E.R. 609.

(6) *Ratcliffe* v. *Evans* [1892] 2 Q.B. 524, 528.

(7) *Schneider* v. *Eisovitch* [1960] 2 W.L.R. 169, 176; [1960] 2 Q.B. 430; [1960] 1 All E.R. 169.

(8) *Allen* v. *Waters & Co.* [1935] 1 K.B. 200, 215.

(9) *Dennis* v. *London Passenger Transport Board* [1948] 1 All E.R. 779.

The following cases were also cited in argument: *Kingman* v. *Seager* [1938] 1 K.B. 397; *London Passenger Transport Board* v. *Upson & Anor.* [1949] A.C. 155, 173.

ACTION FOR DAMAGES.

P. Mooney for the plaintiff.

E. C. Khoo for the defendant.

Cur. Adv. Vult.

Suffian J.: There are three questions for decision in this case:

(1) Was the defendant negligent in colliding with the trishaw ridden by and so causing the death of the plaintiff's husband hereinafter referred to as the deceased?

(2) If so, was the deceased guilty of contributory negligence?

(3) If the defendant was liable either in whole or in part, what is the quantum of damages payable by him?

At about 7.30 p.m. on 14 August, 1958, the defendant was driving along Jalan Raja behind the Selangor Club from the petrol pump end towards the Chartered Bank end. He was driving a medium-sized car, an Opel Rekord, and he was then in second gear. He was accelerating, but he is not certain whether he had changed into top gear, namely, third, immediately before the collision in which the deceased was killed, but he maintains that he was not travelling fast and at the time of the impact he had come almost to a stop. I find that immediately before the collision he was travelling quite fast and I say so for the following reasons. Brake marks left by his off-side wheels on the road which was dry were 60 feet long, and those left by his near-side wheels were 53 feet long. Mr. Mooney for the plaintiff argues, relying on the table on pages 47 and 48 of *Bingham's Motor Claims Cases*, 4th edition, and I agree, that the length of the brake marks shows that the defendant must have been doing at least 35 miles per hour immediately before the accident. Also, I find that the plan, P.6, made by Sergeant Osman, P.W.4, who arrived at the scene soon after the accident, showing that the deceased as a result of the collision was thrown forward 14 feet while the trishaw which he was pedalling was thrown forward 39 feet, is further evidence that the defendant must have been travelling quite fast. Mr. Mooney further argues, and I agree, that the defendant at the time of the accident, was on his way from Ipoh to his home in Petaling Jaya. He had done the journey from Ipoh to the outskirts of Kuala Lumpur in three hours, an impossible feat unless he had been driving quite fast most of the way. To my mind, it is a fair inference that he was still driving quite fast through the town, but as he had been driving fast during the previous three hours, he was unconscious of the speed he was doing through the town.

The defendant says that before the accident he saw the deceased pedalling his trishaw on Barracks Road which joins Jalan Raja. Nevertheless the defendant accelerated and his explanation was that he was on a major road while the deceased was on a minor road which had a "Slow. Major Road Ahead" sign. The defendant did not expect the deceased to enter the major road suddenly, which, according to the defendant and I agree, the deceased did. The defendant could have avoided a collision if he had swerved to the left, but he did not do so as there were many cars parked at right angle to the kerb on that side. Nor did he swerve to the right as he said swerving to the right was a dangerous manoeuvre in ordinary circumstances, though he admitted there was no oncoming traffic at that time. In cross-examination the defendant admitted that he did not take into consideration the fact that the deceased might have entered the major road suddenly.

As to this, Viscount Dunedin in *Fardon* v. *Harcourt-Rivington* [1] said:

> "If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions."

In a later case *London Passenger Transport Board* v. *Upson* [2] Lord Uthwatt said:

> "A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form these follies commonly take."

In my judgment the danger of the deceased suddenly entering the major road (particularly as there is, to the knowledge of the defendant, a slope at the mouth of the minor road) was not a mere possibility which would never have occurred to the mind of a reasonable man; the possibility of such danger should have been reason-

ably apparent to the defendant and yet he took no precautions. He was not entitled not to put out of consideration the folly of the deceased suddenly entering the major road and yet the defendant did so. As:

> "The standard of care and skill which the law must demand from the driver of a motor car today is a very high one indeed. A motor car has become a lethal weapon." (*per Stable* J. in *Daly* v. *Liverpool Corporation* (3))

I find that the defendant was guilty of negligence.

The next question which arises is whether or not the deceased was himself guilty of contributory negligence. As to this, Lord Simon in *Nance* v. *British Columbia Electric Railway* (4) stated:

> "When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove . . . . . that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury."

Did the deceased in his own interest take reasonable care of himself? Or did he contribute, by his want of care, to his own injury? Mr. Mooney submits that there was no contributory negligence on the part of the deceased. The road on which the deceased was pedalling, Barracks Road, was about 6 feet above the level of the road, Jalan Raja, on which the defendant was driving. The defendant driving with his headlights on must have been concentrating on the road immediately ahead of him, so (it is argued) the defendant could not have seen the deceased before the latter entered the major road. I find that it was possible for the defendant to have seen, and probably he had seen, the deceased before the latter entered the major road. As to whether the deceased entered the major road at right angle as alleged by the plaintiff or at a slant in a half left direction as alleged by the defendant, I am unable to decide and accordingly make no finding, but I find that immediately before the impact the deceased was in fact travelling for some reason or other in a half right direction. I make this finding because the left side of the front bumper of the defendant's car was slightly dented while the damage on the trishaw clearly shows that he had been hit from behind on the right. I also find that immediately after the accident the defendant's car came to a stop only eleven feet from the road edge on its near-side and this in my view proves that the deceased was well towards the left-hand side of this very wide road at the time of the impact. Nevertheless, in my judgment the deceased on approaching the major road should have in his own interest taken reasonable care of himself by slowing down or stopping so as to allow the defendant to pass first, and this he did not do. Probably he was propelled forward by the slope at the mouth of Barracks Road into the major road, but nevertheless I find that he had by his own want of care contributed to his own injury, owing probably to misjudgment of the defendant's speed.

In *Lang* v. *London Passenger Transport Board* (5) it was held that a motor cyclist, emerging into a major road at a speed of 20 miles an hour from a minor road without slowing at a "Slow. Major Road Ahead" sign, who was run into and killed by a bus travelling on the major road at about the same speed, was much more responsible for the accident than the driver of the bus and the blame was apportioned as follows, as to two-thirds to the motor cyclist and one-third to the defendant. I wondered whether to divide the blame in this case in the same proportions, but after careful consideration I am of the opinion that both parties were equally to blame and I accordingly find.

The pleadings and some of the notes of evidence refer to the scene of the accident as Club Road, but after Sergeant Osman, a member of the traffic Police in Kuala Lumpur, had testified that the road was known as Jalan Raja, it became common ground that the scene was in fact Jalan Raja. If read with this in mind, the pleadings and the notes of evidence will not be found puzzling.

As to quantum, the plaintiff claims both special and general damages.

As to special damages, first, the plaintiff claims $750, being expenses incurred on the funeral of the deceased. I find that $750 was spent on the funeral but they were incurred not by the plaintiff but voluntarily by friends and relatives who rallied round. She never asked for the loan of these monies, nor have the friends and relatives ever asked for repayment, though some of them have mentioned the amount they spent probably in the hope of being repaid, knowing that the plaintiff was launching this claim against the defendant. The plaintiff feels that she is under a moral obligation to repay these sums and would repay if she received any money. Mr. Khoo for the defendant argues that as the expense has not actually been incurred by the plaintiff who is only under a moral obligation to repay, she is not entitled to it.

There is a description of special damages by Bowen L.J., in *Ratcliffe* v. *Evans* (6) and also a definition by Earl Jowitt in his Dictionary of English Law at page 1659. Neither the description nor the definition helps much in deciding whether or not Mr. Khoo is right, as it speaks of loss incurred, but does not say incurred by whom.

In *Schneider* v. *Eisovitch* (7) Paull J. said:

> "In my judgment, strict legal liability is not the be-all and end-all of a tortfeasor's liability. A plaintiff cannot claim a sum of money because he would like to pay a friend for his services. That would alter the character of the services given. The services must be treated as friendly services given freely by a friend. But to pay out-of-pocket expenses in respect of necessary services freely given does not alter the character of the services. I do not think the test is whether there is a moral duty to pay. Before such a sum can be recovered the plaintiff must show first that the services

rendered were reasonably necessary as a consequence of the tortfeasor's tort; secondly, that the out-of-pocket expenses of the friend or friends who rendered these services are reasonable, bearing in mind all the circumstances including whether expenses would have been incurred had the friend or friends not assisted, and thirdly, that the plaintiff undertakes to pay the sum awarded to the friend or friends."

Here I find that the services rendered by the plaintiff's friends and relatives were reasonably necessary as a consequence of the defendant's tort; secondly, that the out-of-pocket expenses of the friends and relatives who rendered these services were reasonable, and not excessive, bearing in mind the importance which is attached by the Chinese to a proper funeral. As regards the third condition mentioned by Paull J., there is no evidence that the plaintiff has given an undertaking to her friends and relatives that she would repay them, but from the facts of that case it appears that no such undertaking need be given by her, it being sufficient if she gives an undertaking to the Court that she would repay them if I allow the expenses. She gave such an undertaking (she said in re-examination, "I shall pay them if I get any money") and I accordingly allow her the $750, but this is to be reduced to $375 as the deceased was equally to blame for his death.

I find support for this view from what Goddard J., (as he then was), said in *Allen* v. *Waters & Co.* [8]. He said that the test is, was what was done "a reasonable and proper thing" to be done? He went on:—

"If it was, and if an expense has been incurred by doing so, I think it is right that the wrongdoer should bear that cost."

Here it was a reasonable and proper thing to give the deceased a funeral.

In *Dennis* v. *London Passenger Transport Board* [9], Denning J., (as he then was), said:

"The plaintiff tells me, through his counsel, that he is ready to undertake, if he recovers damages, to repay those two bodies, the London County Council and the Ministry of Pensions, the sums they have paid him, which he is under a moral obligation to do. The cardinal point to remember is that it is the defendants who are responsible for what has occurred. In my opinion, a wrong-doer is not to be allowed to reduce damages by the fact that other persons have made up to the plaintiff his wages, like the London County Council and the Ministry of Pensions in this case. The plaintiff has lost his wages. In point of law, therefore, *prima facie* he should have them paid by the wrongdoer. As they have been made up to him by other people who expect to be repaid I think it is proper that that sum should be included as damages, . . ."

Here the plaintiff is ready to undertake, if she recovers damages, to repay her friends and relatives the sums they have spent on the deceased's funeral which she feels she is under a moral obligation to do. The defendant is responsible for the death of the deceased. Why should he be allowed to reduce damages by the fact that other persons, not the deceased's widow, have spent money on the deceased's funeral? In point of law, *prima facie* the plaintiff should have these expenses paid by the defendant. As they have been paid by other people who expect to be repaid, I think that it is proper that she should recover them.

Secondly, the plaintiff claims reimbursement in regard to damage to the trishaw which she puts at $200. The trishaw was bought by the deceased new at least as far back as 1954 for $350. As a result of the accident it was quite seriously damaged. I accept the evidence of the plaintiff and her relation, P.W.3, that immediately before the accident the trishaw was kept in a good condition as the deceased had often replaced its parts. I allow $100 special damages under this head (in arriving at this figure I take into account the probable cost of repairs and the restricted market in which trishaws may be sold), but this again is to be reduced to $50, in view of the way blame has been apportioned.

As regards general damages, the deceased was a trishaw pedaller, aged 35. He left a widow (the plaintiff), aged 34 and four children aged at the time of his death 10, 7, 2 and 1 respectively, the eldest two living with the deceased's father in China and the other two with the deceased and his wife in Kuala Lumpur. A friend of the deceased, also a trishaw pedaller, says that the average earning of a trishaw pedaller is $230 to $240 a month. The plaintiff says that the deceased gave her every month $150 to cover household expenses. Out of this money she gave her husband breakfast, dinner, occasionally lunch also, she kept the two children living with her and she sometimes bought clothes for them. Her husband also paid $20 per month rent for their accommodation. Taking all these into consideration, I find that the approximate value of the dependency of the widow, the two children living with her and the two children in China was $100 per month. I am afraid that this figure is only approximate, but I have to do the best I can with the evidence before me.

The widow also says that her husband sent $45 every month to support their two children in China. She says she has documents to prove this, but they are at home. Mr. Mooney states from the bar that he saw the documents the day before the trial, they cannot be translated in time for the trial and so does not produce them. I regret that I must find that this monthly remittance has not been proved by the plaintiff though I find that to some extent these two children were dependent on the deceased.

In arriving at the quantum of general damages, I take into consideration the probable working life of the deceased had he not died, which I assess at 20 years but which allowing for contingencies and the uncertainties of life I reduce to 15 years, that thereafter he might not be earning as much because of old age and because of the nature of his occupation, that the widow was only 34 at the time of the accident and is not unattractive to persons of her class (indeed by the time of the trial she had become pregnant by a "friend"), and the advantage of the accelerated payment of a lump sum. Taking all these factors into account, and considering

that any award made in the nature of compensation for injury to the deceased's estate, should be deducted from any award made to the dependants, I assess the compensation, based on a dependency worth $100 p.m., at $13,000 on the basis of 100% liability. But as the deceased was equally to blame for his death, the award is accordingly reduced to $6,500 which I apportion as follows:—

Plaintiff, widow	...	$ 3,000
Teh Leong Chong, son	...	535
Teh Kim Inn, daughter	...	740
Teh Leong Hin, son	...	1,075
Teh Leong Tong, son	...	1,150.

The $3,000 is to be paid to the widow's solicitors; the children's shares are to be paid into court, pending further order or orders.

As regards costs, I decide after hearing argument that they are a matter within the discretion of the Court and in the circumstances of this case it is fair and just that the defendant should pay all the plaintiff's costs.

Order accordingly.

Solicitors: *Bannon & Bailey; George & Khoo.*

LIM CHENG v. SANDANAM

[A.C.J. (Hashim J.) April 3, 1962]

[Raub — Civil Appeal No. 1 of 1962]

Practice and Procedure — Failure to extract order of trial Magistrate — Technical flaw curable under R.S.C., O.59 r.4(1).

The failure to extract the order of the trial magistrate and the omission of the "decision" in the appeal record under O.XXXIX r.3(1)(d) of the Subordinate Courts Rules was a technical flaw which should be rectified by O.59 r.4(1) of the Rules of the Supreme Court.

PRELIMINARY OBJECTION.

Kam Woon Wah for the appellant.

Lall Singh for the respondent.

Cur. Adv. Vult.

Hashim J.: At the hearing of this appeal case Mr. Lall Singh for the respondent raised a preliminary objection, which, in my opinion, was a novel one. He contended that as the appeal record did not include "the decision" under Order XXXIX r.3(1)(d) of the Subordinate Courts Rules the appeal record was not complete and therefore the appeal should be dismissed. He further contended that the appeal should be dismissed on the second ground, namely that the appellant had failed to extract the decision given by the lower Court. Unfortunately, Mr. Lall Singh did not cite any authorities in support of both his contentions.

The procedure on appeal appears to be as follows:—

(a) The Notice of appeal shall be filed within 14 days from the day on which such decision was pronounced.

(b) The Court appealed from shall thereupon supply to the appellant, upon payment of the fee therefor, a certified copy of the judgment, or, in case no written judgment has been delivered, of the grounds of decision.

(c) The Court shall notify the appellant as soon as the certified copy is ready.

(d) The appellant shall within 14 days on receipt of the notification deposit in the Court a sum which in the opinion of the Registrar Sessions Court or the Magistrate, as the case may be, will cover the costs of preparing the appeal record and at the same time the appellant shall lodge in the Court $150.

(e) The Court *shall* then prepare the appeal record which *shall* contain copies of:

(i) the relevant pleadings,
(ii) the notes of evidence,
(iii) the grounds of judgment,
(iv) *the decision*,
(v) the notice of appeal,
(vi) all such documentary exhibits and other documents as the parties shall consider relevant for the purposes of appeal.

(f) As soon as the appeal record is ready the Court shall serve the appellant with a notice in Form 40.

It can be seen from (e) above that the appeal record shall contain "the decision". If "the decision" means the order of the trial Magistrate, it would appear that the order must be extracted before the Court can prepare the appeal record. The question for determination in this appeal is whether the failure to extract the order and the omission of the decision in the appeal record could mean that the appeal was not in order as it did not comply with the rules as laid down in Order XXXIX of the Subordinate Courts Rules and therefore the appeal should be dismissed. I think this is a matter of procedure and the appeal should not be dismissed for a technical flaw in the procedure. I think O.59 r.4(1) of the Rules of the Supreme Court should be applied in this case. The order of the trial Magistrate be extracted by the appellant and the appeal record be amended by including "the decision". Costs for the day to the respondent. The Assistant Registrar, Supreme Court, Raub shall fix a date for the hearing of this appeal case.

Order accordingly.

Solicitors: *Kam Woon Wah & Co.; Lovelace & Hastings.*

TRANSPORT & STORAGE LTD. v. YEO SUE TUAN & 71 ORS.

[D.C.A. (Rose C.J.) May 17, 1962]

[Singapore — District Court Appeal No. 22 of 1961]

Master and Servant — Claim for holiday pay and pay in lieu of annual leave under ss.46 and 47 of the Labour Ordinance, 1955 — Employees daily paid employed on rotation — Whether casual labour or continuously employed.

The respondents claimed holiday pay and pay in lieu of annual leave from their employers, the appellants, under sections 46 and 47 of the Labour Ordinance, 1955. The defence was that the respondents were casual labourers with no element of continuity of service and